Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1294

In the Matter of
THE BOHACK CORPORATION,

Debtor.

THE BOHACK CORPORATION,

Petitioner.

-against-

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

In the Matter of
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Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Bohack Corporation, Debtor-in-Possession, requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed an order of the Hon. Jacob Mishler, United States District Judge for the Eastern District of New York, which in turn affirmed an order of the Hon. C. Albert Parente, Bankruptcy Judge, holding that severance pay for respondent union members, who were discharged after the date of filing by Petitioner of an original petition pursuant to Chapter XI of the Bankruptcy Act, constituted an administration claim against the estate of the Debtor pursuant to Section 64a(1) of the Bankruptcy Act.

THE OPINIONS BELOW

The order of the Bankruptcy Judge entered on February 20, 1975 stated in pertinent part as follows:

> "Thereafter, and on the 22nd day of January, 1975, in the course of an informal hearing on Defendant's application for a temporary injunction, the parties hereto entered into a stipulation providing for the payment of the aforesaid severance pay. The defendant, however, reserved its right to appeal as to the propriety of the Court's declared intention to adhere to the decision rendered by the Circuit Court of Appeals in the matter of *Straus-Du Parquet, Inc. v. Local Union #3, International Brotherhood of Electrical Workers, A.F. of L., C.I.O.*, 386 Fed. 2d 649, wherein the Court held that severance pay constitutes an administration claim.
>
> Constant with the foregoing, it is ORDERED, ADJUDGED AND DECREED that the claim for severance pay herein is deemed an expense of administration and that the Plaintiff have judgment therefor, pursuant to the provisions of the stipulation aforesaid." (A-1, 2)

Judge Mishler in affirming Judge Parente on April 21, 1975, did not issue an opinion. In affirming Judge Mishler on April 12, 1975 (A-7, 8), the Second Circuit Court of Appeals stated (A-8); "affirmed on the authority of *Straus-Duparquet Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, AF of L, CIO.* 386 F2d 649, (2nd Cir. 1967)."

JURISDICTION

The jurisdiction of this court is invoked, made and confirmed under 28 U.S.C. 1254(1) and Rule 22(3) of the rules of this Court. The Court of Appeals affirmance was entered on December 12, 1975.

QUESTION PRESENTED

Where an employer which has a union contract with a group of employees containing a severance pay provision, files a petition pursuant to Chapter XI of the Bankruptcy Act, and thereafter the employment of the workers covered by the contract is terminated, and such contract contains a provision for severance pay, is the workers' claim for severance pay an administration claim against the estate of the Debtor pursuant to Section 64a(1) of the Bankruptcy Act, or a priority wage claim pursuant to Section 64a(2) of the Bankruptcy Act.

THE PRINCIPAL STATUTES INVOLVED

Bankruptcy Act

"§64. Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary and expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases) where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of the recovery; the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under

other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the reasonable disbursements made, by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount as the court may allow. Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding, including expenses necessarily incurred by a debtor in possession, receiver, or trustee in preparing the schedule and statement required to be filed by sections 238, 378, or 483, shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a

commission basis, with or without a drawing account or formal contract; . . . "

STATEMENT OF THE CASE

This is an action instituted by the Respondent that is a collective bargaining representative for a group of employees whose jobs were terminated by the Petitioner, as Debtor-in-Possession, subsequent to the filing of the original petition pursuant to Chapter XI of the Bankruptcy Act. The original complaint contained 56 causes of action on behalf of individual employees based on the severance pay provision in the contract between the Debtor corporation and the employees' union. Upon submission to the Bankruptcy Court, the Bankruptcy Judge indicated his intention to adhere to a decision of the Second Circuit, *Straus-Deparquet Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, AF of L, CIO*, 386 F.2d 649. Petitioner and Respondent then entered into an agreement for the Debtor corporation to pay to the union as disbursing agent for all employees the full amount of their severance pay, on a five year installment basis, subject to the debtor corporation's right to appeal the Bankruptcy Judge's decision. (A-3, 4)

By stipulation between the parties, it was agreed that any future decision on the issue of whether severance pay constituted an administration claim would be binding with respect to all members of the union situated similarly to all members of the union on behalf of whom the original complaint was brought (A-4). It was agreed that the total amount due, assuming that the union ultimately prevailed, from the debtor corporation to all union members similarly situated was $607,511.60. That stipulation was embodied in the order of affirmance by Judge Mishler in a footnote to his decision entered on May 28, 1975 (A-6). In fact, the sum of $43,526.49, representing severance pay earned after

the date of the filing of the petition, was agreed upon as an administration claim.

It is agreed by the parties that the contractual provision is a true severance pay provision, and the sole issue involved is whether severance pay constitutes a priority wage claim or an administration claim against the estate of the debtor.

THE REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the question presented herein is appropriate for review by this court both because of the enormous practical economic considerations involved in allowing the Second Circuit's decision in the matter of *Straus-Du Parquet, Inc. v. Local Union #3 International Brotherhood of Electrical Workers, A.F. of L., C.I.O.* to stand, and because there has been such a diversity among the various circuits with respect to the proper way to treat a severance pay action in a Chapter XI proceeding, that a ruling by this court is necessary for a definitive holding as to the effects of such claims against the debtor in a Chapter XI proceeding.

The number and stature of corporations filing for arrangements under Chapter XI of the Bankruptcy Act has dramatically risen, causing a significant increase, both quantitatively and qualitatively, in the Bankruptcy Courts' caseloads and reflecting the practical consequences of bankruptcy rulings on the economics of the nation. Information supplied by the Administration Office of the United States Court shows that between 1969 and 1975 the number of Chapter XI petitions filed throughout the country rose from 867 to 3,506, an increase of more than 400% over a five year period. This in itself demonstrates the important impact of bankruptcy rulings with respect to the economy as a whole.

More importantly, in the last few years the nature and stature of the corporations seeking arrangements has drastically changed. Industrial and commercial giants, once considered immune to vagaries in the nation's economy, have filed such petitions. The Penn Central, Railway Express, W.T. Grant and other corporations of similar stature have sought the aid of the bankruptcy courts in reorganizing. The failure of Railway Express and Grants to successfully achieve reorganization indicates the difficulty involved in such proceedings and the strain placed upon the debtors by virtue of claims made under executory contracts. Needless to say, severance pay claims under rejected labor contracts fall into such a category.

The Second Circuit has recently held in *Shopmen's Local Union No. 445 (NLRF) v. Kevin Steel Products, Inc.*, 519 F.2d 698 that a Bankruptcy Court has the right to approve a Debtor's rejection of an executory labor contract, notwithstanding conflicting provisions of the National Labor Relations Act, upon close scrutiny of the equities involved in such a rejection. It is respectfully submitted that to allow the Court to approve such rejection and at the same time bind the court to recognize one of the most onerous and burdensome aspects of such a contract, i.e., the severance pay provision for which no value is received, would frustrate the purpose of the reorganization proceedings.

The case at hand is a rather obvious example of the inequity of enforcement of a severance pay provision in a Chapter XI proceeding. Although the union, in a spirit of cooperation, did agree to a pay out of the severance pay claim if it was found to be entitled to it, the fact of the matter is that under Second 64a(2) of the Bankruptcy Act each individual claim would be limited to $600 as a priority wage claim. There is no limit, however, in the contract, and

thus the claims of the individuals as administration claims are chargeable to the extent of more than a half a million dollars in cash against the estate above and beyond the limitation of the priority wage claim set forth in Section 64a(2). Inasmuch as an amended plan of arrangement is soon to be submitted, this half million dollars represents a very substantial amount to the other creditors at large, and could conceivably make the difference between an acceptable plan and one that cannot be confirmed, inasmuch as the provisions of the amended plan indicate that a half million dollars represents a substantial percentage of the contemplated payout.

A Bankruptcy Judge in the First Circuit has declined to follow the action of *Straus-Du Parquet, Inc. v. Local Union #3, International Brotherhood of Electrical Workers, A.F. of L., C.I.O.* on the grounds that it is detrimental to the rehabilitation purpose of the Chapter XI proceeding. We herewith quote extensively from relevant portions of Judge Lavien's decision in *Mammouth Mart (Del) and Subsidiaries*, published in Corporate Reorganization Reporter Bankruptcy Court decisions May 29, 1975, at pp. 909-912, which we feel fairly summarizes our position here.

> "In order to insure fairness in return for majority control, the minority was assured of a limited and strictly construed group of statutory priorities found in Sec. 64 of the Bankruptcy Act and an expectation that all other unsecured creditors would be treated equally.
>
> [3] The scant legislative history of Section 64a(1) sheds little light on its scope or application. Prior to 1962, the statute had no generally descriptive words but set out in order a number of specific expenses to be given priority. The order in which specific outlays were listed was construed as creating a schedule of subpriorities, and, therefore, claims under the section were given

relative priority depending upon their position in the statutory list. In 1962, the statute was amended to characterize all Section 64a(1) expenses as "costs and expenses of administration" and to include as such all of the types of expenses formally listed. While the congressional reports accompanying the amendment only indicate Congress' concern that all Section 64a(1) be given equal priority, the Court in *In re Connecticut Motor Lines, Inc.*, 336 F.2d 96 (3rd Cir. 1964) read a mandate for narrow construction into the amendment.

'Through those enumerated costs and expenses of administration were never meant to be all inclusive, the 1962 amendment does indicate a concern that a meaningful view be had as to what is to be considered a cost and expense of administration." 336 F.2d at 102.

See, S.Rep.No. 1954, accompanying H.R. 5393, U.S. Code and Administrative News, pp. 2602-2603 (1962).

About half of the Bankruptcy Act, by volume, has to do with rehabilitation rather than the interment of the financially distressed and this is done by holding off creditors while under the control of the court the salvage job is assayed and undertaken."

46 Am. Bankruptcy Law Journal, 311.

* * *

In order for the debtor in possession to prime and try to restore the sick business operation, under prodding from the creditors committee and direction of the court it is given the authority to discard burdensome executory contracts. Sec. 313(1) of the Bankruptcy Act, 11 USC 713(1).

> 'Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and

elsewhere in this chapter conferred and imposed upon it-

'(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;"

* * *

"[5] Section 353 of the Bankruptcy Act, 11 USC 753, provides that when rejected, the offended party simply becomes a creditor. Only one special case noted, and that is the landlord, but even here his claim is that of a general unsecured creditor.

"What could be more natural than a debtor-in-possession reducing staff in trying to work out a Chapter XI? The only right to severance pay is based on the earlier determination [6] of this court that these employees enjoyed the right to severance pay as an incident to their employment, a contractual right which the debtor most naturally finds burdensome and rejected.

"Severance pay" has been described as wages.

'The claims under the layoff provision of the contract are for wages. The provision protects against a sudden, unexpected and unprepared for stoppage of wages. It provides that knowledge of a break in the continuity of work and consequent lack of pay shall be given the employee and it is the employer's duty to give it. If he does not give it, the wages continue unaffected for the term of the required notice. Whether the layoff occurs through bankruptcy or any other cause does not affect the validity of this wage requirement. For the lack of a better term, we call this contractual arrangement one for severance pay."

In re Public Ledger, 161 F. 2d 762 at 760 (3rd Cir. 1947), 'severance pay' is denominated wages.

"To find otherwise would mean that the cash-poor, sick company needing rehabilitation because of an unduly large payrool must either have the good sense to fire everyone with severance pay before Chapter XI (if it had shown good sense it probably wouldn't be in Chapter XI), or face the court with the problem of retaining excessive overhead because it couldn't afford to fire them—just what Sec. 313(1) allowing rejection of executory contracts was designed to avoid.

"This seems to be the result if *Straus-Duparquet, Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, A F of L, CIO*, 386 F.2d 649 (2nd Cir. 1967) is applied. Enlightened management may find it impossible to reorganize while management that never offered severance pay, or in fact may not have even paid the previous year's wages, would get the full benefits of Sec. 313(1) and Sec. 64a(1) governing administrative expenses and Sec. 64a(2) governing wage priorities.

"Further, with all due respect, the *Straus-Duparquet* case doesn't discuss Sec. 64 of the Bankruptcy Act which lists the only grounds for priority. See Sec. 64a(1).

'The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . ."

"[7] The court considers the sole operative fact

to be the termination during the Chapter XI that triggered the claim for severance pay; but isn't that true of every executory contract? By contrast, Sec. 64a(a) in order for there to be an administrative expense requires that the expense be " . . . actual and necessary costs and expenses of preserving the estate subsequent to filing the petition." Exactly the opposite is true here. This expense offers no benefit to the funds under the court's administration nor does it aid in financing the plan, nor does it aid in providing ratable distribution to all unsecured creditors.

> See *Otte, Trustee in Bankruptcy v. United States et al.*, U.S. Supreme Court, November 19, 1974. 43 Law week, 4008.

"The question of wage priority is expressly covered in Sec. 64a(2).

> "Debts Which Have Priority. a.(2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding . . ."

"These are continuing wages that were earned prior to the filing of the Chapter XI that became payable on termination of employment. The debtor in possession having already paid four weeks severance pay, the $600 priority has been exhausted and the balance of the severance wage claim is properly treated as damages for rejection of the executory contract for severance pay.

* * *

"Whether the debtor in possession could in fact have legally paid more than $600 in severance pay has not been raised and need not now be decided.

"In similar problems of chapter administration,

cases dealing with this question of administrative expense based on the triggering incident taking place after filing, courts have not found that enough to make them administrative expenses.

"The courts have held that taxes that fall due during administration for pre Chapter wages were not expenses of administration since they did not protect or develop the debtor in possession estate. The same with salesmen's commissions on orders filled after the filing.

> [8] *In re Connecticut Motor Lines, Inc.*, 336 F.2d 96 (3rd Cir. 1964)
> *Denton & Anderson Co. v. Induction Heating Corp.*, 178 F.2d 841 (2d Cir. 1949).
> *In re American Anthracite & Bituminous Coal Corp.*, 171 F.Supp. 377 (S.D.N.Y. 1959), aff'd 280 F.2d 119 (2d Cir. 1959).

"In a recent decision the Supreme Court rejected as administrative expense withholding taxes that accrued on wage claims paid after the filing and pointed to the error in the too liberal assumptions of taxes as part of administrative expense rather than as part of the wage priority.

> 'We similarly reject the first priority, although we recognize that this appears to be the favorite conclusion reached by those courts that have passed upon the issue. See n. 3, *supra*. The leading case for this approach is *United States v. Fogarty*, *supra*. The Court there, however, without a statement of underlying reasons, merely concluded that the taxes 'should be allowed and classified as an expense of administration,' 164 F.2d, at 33. In *Lines v. State of California, Dept., of Employment*, *supra*, the court followed

Fogarty and held that, because the tax accrued 'subsequent to the filing of the petition in Bankruptcy, such tax had the character of an expense of administration.' 246 F.2d, at 71.'

Otte, Trustee in Bankruptcy v. United States et al. U.S. Supreme Court November 19, 1974, 43, Law Week, 4008.

"It hardly seems that wages should be allowed a higher status than taxes, especially since the implied agreement to pay severance pay was that of the debtor, not the debtor in possession. [9] In the *American Anthracite & Bituminous Coal Corp.* case, *supra*, the 2nd Circuit, in denying administrative expense status for the rejection of an executory contract, stated:

'Where no benefits are received by the bankrupt estate or its representative under the contract, and the contract is not assumed, the creditor's claim is not entitled to priority, . . . although of course, upon rejection, the creditor may file a general claim against the estate . . . 280 F.2d at 124-125.

"Here the only benefit conferred upon the debtor in possession by the presence of the appellants' ships for the period between the filing of the petition and the rejection was the value of the option either to accept or reject the charter. The same sort of benefit would be realized in the case of a lease or real property not occupied by the debtor; yet in exactly such a situation we denied any priority, *In re United Cigar Stores Co.*, 2nd Cir., 69 F.2d 513, certiorari denied sub nom. *Reisenwebers, Inc. v. Irving Trust Co.*,

1934, 293 U.S. 566, 55 S.Ct. 76, 79 L.Ed. 665." 280 F.2d at 126.'

"While not directly relevant, the Report of the Commission on the Bankruptcy Laws of the United States (93rd Congress, 1st Session, House Doc. No. 93-137) is of interest insofar as it represents an attempt by a number of experts in the field of bankruptcy law to reform and revise the Bankruptcy Act of 1898 as presently in effect. The Report deals with the question of severance pay, vacation pay and similar fringe benefits, and recognizes that such fringe benefits constitute a form of compensation which, like wages, should be afforded priority in the distribution of a bankrupt's estate. The Report recommends that the $600 wage priority presently contained in Section 64a(2) be increased to $1,200, and that severance and vacation pay be treated as wages entitled to that priority, subject to the $1,200 limit. Report of the Commission on the Bankruptcy Laws of the United States, Part I, pages 214-215, and Part II, Section 4-405(3) and (4) and Notes 3 and 4 thereto, at pages 109-112."

The reasoning of the Second Circuit with respect to severance pay as expressed *In the Matter of Straus-Duparquet*, is as follows:

"Severance pay was properly held to be an expense of administration. Severance pay is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances. After the period of eligibility is served, the full severance pay is due whenever termination of employment occurs. Severance pay is a form of compensation for the termination of the employment relation, for reasons other than the displaced employees' misconduct, primarily to alleviate the consequent need for economic

> readjustment but also to recompense him for certain losses attributable to the dismissal. *Adams v. Jersey Central Power & Light Company*, 21 N.J. 8, 13-14, 120 A2d 737, 740 (1956).
>
> Since severance pay is compensation for termination of employment and since the employment of these claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such an expense." (at p. 651).

Most of the cases throughout the other Circuits have treated severance pay as a priority wage claim rather than an administration claim. In the only other case holding severance pay to be an administration claim in part, *In Re Public Ledger*, 161 F.2d 762 (3d Cir., 1947), the Court said that that portion of the severance pay earned after the filing of the petition was to be treated as an administration claim and that portion earned prior to the filing was to be treated within the provisions of Section 64a(2) of the Bankruptcy Act. Thus, the Court said, at page 774:

> "As a recapitulation, under the Guild contract the money to be paid under the provision for discharge pay is held to be wages and entitled to payment out of the estate. That part earned under the administration of the trustees is entitled to priority as administration expenses, §64, sub. a(1). That part earned within the provisions of §64, sub. a(2) is entitled to the priority provided for by that section of the Bankruptcy Act. (Here the severance pay was conditioned upon a given length of service.)"

Closer to the reasoning of this Court in *Straus-Duparquet* that severance pay is compensation for termination of employment rather than wages is ***In Re Ad Service Engraving Company***, 338 F.2d 41 (6th Cir., 1964), where the Court held that termination pay constitutes

damages rather than wages earned, but reached an entirely contrary result and held that severance pay claims were equivalent merely to general unsecured claims and should be denied priority under Section 64a(2).

Assuming the validity of the general rule that severance pay is entitled to a Section 64a(2) priority, the Court in *Straus-Duparquet* changed the claim from a wage claim to a damage claim with a super priority. In attempting to alleviate the consequences of loss of employment, the Court extended the Section 64a(2) priority and treated severance pay claims as liquidated damages.

We respectfully submit that there is no warrant in law or equity for such a result. Other creditors who suffered damages as the result of the filing of a Chapter XI petition or acts of the debtor consequent to that filing are relegated to general unsecured claims, or to specific statutory relief as set forth in the Bankruptcy Act. An obvious example is a landlord with whom a debtor had a lease which the debtor seeks to terminate under the protection of the Bankruptcy Court. By statute the landlord is relegated to a general unsecured claim for damages, equivalent to three years rental. Congress, in enacting Section 64a(2) of the Bankruptcy Act, set forth specific statutory relief for wage earners. We respectfully submit that there is no general equity power in the court to extend such statutory relief to the super priority we have ascribed to the beneficiaries of the holding in *Straus-Duparquet*.

If the court appropriately balances the equities in such a case, in this case the contrary holding would be required. Although the original claim of the Appellee was on behalf of approximately 56 employees of the Union, by stipulation approved by the Bankruptcy Court, the result was made to apply to all employees similarly situated. In this case then,

the debtor would be subject to an immediate payment of more than $600,000 to the former employees upon confirmation of a plan of arrangement (A-4). Such a required payment might in fact prevent a satisfactory plan from being proposed and confirmed. Here, in order to survive, Bohack was forced to go out of its warehouse and delivery business completely and change the whole nature of its operation to a purely retail supermarket chain, significantly reduced in size and scale. The imposition of an additional burden of an unwarranted administration claim would create great hardship to the other creditors of Bohack, many of whom, primarily the trade creditors, were as intimately concerned with the day-to-day business of Bohack as Bohack's own employees, and who in many cases suffered almost as much as the employees.

As noted before, *In Re Public Ledger*, is the case most cited for the proposition that priority should be attributed to severance pay claims, and in that case, as well as others facing that issue, a variety of labor contracts were interpreted in such a way so that any claim for any kind of compensation in lieu of dismissal notice or on account of dismissal could be considered severance pay for the purpose of attaining a priority under Section 64a(2) of the Bankruptcy Act. In none of them, however, was a 64a(1) preference granted. See *McCloskey v. Division of Labor Law Enforcement*, 200 F.2d 402 (9th Cir., 1952); *In Re Otto*, 146 F.Supp. 786 (D.C. Cal., 1956); *In Re Men's Clothing Code Authority*, 71 F.Supp. 469 (S.D.N.Y. 1937).

In conclusion, it is respectfully submitted that the holding of the Second Circuit *In the Matter of Straus-Duparquet* extends the statutory relief to be granted to employees of companies seeking protection under the Bankruptcy Act beyond the scope of the congressional

intent and beyond all other decisional law in the federal system. Although the court was obviously attempting to seek an appropriate result for the protection of the people employed by the debtor in *Straus-Duparquet*, to work such a result in this case would severely hamper the proposal and implementation of a successful plan of arrangement, and thus, the equitable nature of the court's relief would work a greater inequity on the remaining employees of the debtor.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

J. STANLEY SHAW
Attorney for Petitioner
A member of the Bar of the
United States Supreme Court

OTTERBOURG, STEINDLER, HOUSTON & ROSEN,
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and

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official creditors committee.

APPENDICES

Order of District Court dated February 20, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Bankruptcy No. 74-B-933

In the Matter of

THE BOHACK CORPORATION,

Debtor.

GENERAL WAREHOUSEMEN'S UNION, LOCAL #852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff,
Defendant.

Plaintiff, General Warehousemen's Union Local #852, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as agent, instituted a suit against the Defendant, The Bohack Corporation, seeking judgment in the composite amount of $43,526.49 as and for severance pay accrued in behalf of former warehouse employees of the Defendant.

Thereafter, and on the 22nd day of January, 1975, in the course of an informal hearing on Defendant's application for a temporary injunction, the parties hereto entered into a stipulation providing for the payment of the aforesaid severance pay. The Defendant, however, reserved its right to appeal as to the propriety of the Court's declared intention to adhere to the decision rendered by the Circuit

Court of Appeals in the matter of *Straus-Du Parquet, Inc. v. Local Union No. 3, International Brotherhood of Electrical Workers, A.F. of L., C.I.O.*, 386 Fed 2d 649, wherein the Court held that severance pay constitutes an administration claim.

Constant with the foregoing, it is ORDERED, ADJUDGED and DECREED that the claim for severance pay herein is deemed an expense of administration and that the Plaintiff have judgment therefor, pursuant to the provisions of the stipulation aforesaid.

s/C. Albert Parente
C. ALBERT PARENTE
Bankruptcy Judge

Dated: February 20, 1975
Jamaica, N.Y.

* * *

STIPULATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of

THE BOHACK CORPORATION,

Debtor

GENERAL WAREHOUSEMEN'S UNION, LOCAL No. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff-Appellee,

-against-

THE BOHACK CORPORATION,

Defendant-Appellant.

IT IS HEREBY STIPULATED by and between the attorneys for The Bohack Corporation, Debtor-in-Possession and General Warehousemen's Union Local No. 852 that the order and decision of the Hon. C. Albert Parente, Bankruptcy Judge entered on or about February

20, 1975, with respect to the payment of severance pay as an administration claim shall be binding with respect to all members of the Union situated similarly to those members of the Union in behalf of whom an action was brought for the sum of $43,526.49.

IT IS FURTHER STIPULATED AND AGREED that the amount due from the Debtor-in-Possession to those persons similarly situated, included those in whose behalf the action was brought, is $607,511.60.

IT IS FURTHER STIPULATED AND AGREED that any appeals from such order of Judge Parente shall be considered to cover all members of the Union similarly situated whether or not suit was brought in their behalf, and that the amount in question shall be deemed to be $607,511.60.

Dated: New York, N.Y.
April 29, 1975

s/J. Stanley Shaw
J. STANLEY SHAW
Attorney for The Bohack Corporation,
Debtor-in-Possession

LEONARD SCHWARTZ,
Attorney for General Warehousemen's Union,
Local No. 852

DISTRICT COURT MEMORANDUM DECISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of

THE BOHACK CORPORATION,

Debtor.

GENERAL WAREHOUSEMEN'S UNION LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff-Respondent,

-against-

THE BOHACK CORPORATION,

Defendant-Appellant.

Appeal from the order made and entered by th3 Honorable C. Albert Parente, Bankruptcy Judge, on February 20, 1975, in favor of General Warehousemen's Union Local No. 852, etc., plaintiff-respondent, directing

the Bohack Corporation, debtor, to pay the sum of $43,526.49 as an expense of administration.*

The order is affirmed.

s/
U.S.D.J.

* May 28, 1975—By stipulation dated April 29, 1975, the parties agree that the final determination in this proceeding shall bind all members of the Union similarly situated, and in the event the Union prevails the total amount due the class from the debtor in possession is in the sum of $607,511.60.

s/Jacob Michler
U.S.D.J.

ORDER AND JUDGMENT OF COURT OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of December, one thousand nine hundred and seventy-five

Present:
HON. JAMES L. OAKES
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges,

In the Matter of

THE BOHACK CORPORATION,

Debtor

General Warehousemen's Union Local #852, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as agent,

Plaintiff-Appellee,

v.

The Bohack Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the authority of *Straus-Duparquet Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, AF of L, CIO*, 386 F2d 649, (2nd Cir. 1967)

s/James L. Oakes
s/Ellsworth A. Van Graafeiland
s/Thomas J. Meskill
USCJJ

75-1294

Supreme Court, U. S.
FILED
APR 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-5012

In the Matter of

THE BOHACK CORPORATION,

Debtor,

THE BOHACK CORPORATION,

Petitioner,

against

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852. AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AS AGENT.

Respondent.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIEGEL, SOMMERS & SCHWARTZ
By: LEONARD SCHWARTZ
A member of the Bar of the United States Supreme Court
Attorneys for Respondent
225 West 34th Street
New York, New York

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-5012

In the Matter of

THE BOHACK CORPORATION,

Debtor,

THE BOHACK CORPORATION,

Petitioner,

against

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852. AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AS AGENT.

Respondent.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

The question as presented by the Appellant and the principal Statutes involved as set forth in the Appellant's Brief are substantially correct.

The allegations set forth in the Statement of the Case in the Appellant's Brief are also substantially correct.

The Reasons for Opposing the Writ

It is respectfully submitted that the Appellant has failed to set forth proper reasons why this Court should entertain the petition for the Writ of Certiorari as provided for in Rule 19 of the Rules of this Court. There has been no conflict of decisions by Courts of Appeals on the matter in issue. It is further submitted that none of the other provisions of Rule 19 of the Rules of this Court are involved in the case at bar.

The Appellant has referred to the decision of the Court of Appeals for the Second Circuit *In the matter of Straus-Du Parquet, Inc.* v. *Local Union #3 International Brotherhood of Electrical Workers, A.F. of L., C.I.O.*, 386 F. 2d 649 (2d Cir. 1967) which was the predecessor decision relating to the matter in issue. However, the Appellant seems to overlook completely the rationale of the decision in the *Straus-Du Parquet, Inc.* case which has been affirmed by the decision of the Court of Appeals for the Second Circuit in the case at bar.

In the case at bar and in the *Straus-Du Parquet, Inc.* case, the Court of Appeals for the Second Circuit resolved the matter upon the question of when did the action accrue in favor of the workers. It should be pointed out that there has never been any issue before the Courts below with respect to the interpretation of the provisions of Section 64(a)(1) and Section 64(a)(2) of the Bankruptcy Act. The reasoning of the Court of Appeals as set forth in the opinions of Judge Hays and Judge Waterman in the *Straus-Du Parquet, Inc.* case and as followed by the Court of Appeals in the case at bar is to the effect that the cause of action of the Respondents did not accrue or come into being until the Appellant terminated the employment of the workers in question. Therefore, if the employees of

the Appellant were never terminated, they had no legal cause of action nor could they assert any claim under any of the provisions of Section 64 of the Bankruptcy Act for severance pay. In fact, at the present time, there are still some employees covered by the contract between the parties hereto who are yet in the employ of the Appellant and who do not have any claim for severance pay against the Appellant.

It is respectfully submitted that the distinction must be made that until the Appellant, the employer in question, commits the act of severing the employment of the employees in question, these employees have no cause of action and have no claim for severance pay. Furthermore, it is submitted that in the event the employees should resign their position or in the further event that any of the employees in question should die, neither the employees nor their estate would have any claim whatsoever against the Appellant for severance pay.

It is respectfully submitted that the Appellant deliberately ignores the import of the decision of the Courts below who have indicated in their decisions most clearly that the basis of the claims of the Respondent takes place at the time when the severance is committed by the Appellant. Until the Appellant acts to terminate the employment of the employees, these workers have no claim for severance pay.

It is conceded by all parties that the employees involved in this case were terminated during the Chapter XI proceeding. Therefore, the cause of action arises at the moment when the termination takes place by reason of the act of the employer, the Appelant in this case. This cause of action arose during the Chapter XI proceeding when the Appellant was acting and still acts as a Debtor-In-Possession. It would therefore necessarily have to fol-

low that the cause of action of the employees would be similar to any other cause of action that would accrue to any other creditor whose right of action takes place during the pendency of the Chapter XI proceeding. It is quite clear that any cause of action that arises during the pendency of the Chapter XI proceeding is an administration expense claim as provided for in Section 64(a)(1) of the Bankruptcy Act. It is submitted that the Court of Appeals for the Second Circuit in the *Straus-Du Parquet* case and in the case at bar both decided that until the employer terminated the employment of the workers, these employees had no right to a claim for severance pay. Therefore, the provisions of Section 64(a)(2) could not apply to a claim for severance pay and that this was never intended by Congress in the enactment of Section 64(a)(2) of the Bankruptcy Act.

It is respectfully submitted that the reference by the Appellant to the economic conditions of the times and the filing of petitions for Arrangement of companies should be taken into consideration by this Court are improper and would lead to a great deal of confusion. In fact, the reference to the cases by the Appellant are even inaccurate because a reference to the *matter of the Penn Central* refers to a case that is not even a Chapter XI case but is a Railroad Reorganization case. Furthermore, any reference to the fact that there is a comparison between the reasons for the failures of the Penn Central, Railway Express, W. T. Grant and other corporations and severance pay claims is too ridiculous for embellishment. The reasons why there is no connection whatsoever between the two positions is that the severance pay claims in those matters do not come into issue at the time of the filings of petitions for Arrangements or Reorganizations under the Bankruptcy Act. The

claims for severance pay may never come into existence if the services of the employees in question are never terminated. It is further submitted that the fluctuation of the economic times of the country cannot be asserted for an interpretation of the Bankruptcy Act. It is respectfully submitted that we cannot have one set of decisions when the economic conditions of the country may be at a low and then have another set of decisions when prosperity may reign.

It is further submitted that the statements made by the Appellant that the reasons for the failure of Railway Express and W. T. Grant to achieve reorganization due to severance pay claims is too ridiculous for words and is not predicated upon any facts whatsoever. The truth of the matter is that all published statements made by management of W. T. Grant has been to the effect that the reason for its failure is due to the fact that it opened a great number of stores in bad locations with onerous leases and also due to the poor economic conditions of the country. With respect to the *Railway Express* case, again there was no connection between the severance pay claims of employees and the reasons for its failure. In fact, the Unions representing the employees were willing to take over the operation of the Railway Express Agency but were denied this opportunity. In the case of the Penn Central, certainly the question of severance pay claims never even entered into the reasons for the necessity of filing a Railway Reorganization petition in bankruptcy. The reasons given were the dramatic drop in the railroad business. It was indicated that passenger travel had dropped materially, investments that had been made turned out very poorly and even the freight business of the Penn Central which at one time was very lucrative had dropped quite dramatically. Cer-

tainly, any reference to the increase of filings of petitions in bankruptcy have no connection whatsoever with the case at bar. In addition, the Appellant very conveniently overlooks the fact that the number of personal wage earner petitions in bankruptcy have risen at an alarming rate during the past few years where they now amount to over 200,000 personal petitions in bankruptcy of wage earners per year and certainly the Appellant could not indicate that severance pay would be a reason for the filing of a petition in bankruptcy by a former wage earner.

It is respectfully submitted that the cases referred to by the Appellant with the exception of one case decided by a lower court have absolutely no relevancy to the case at bar.

The Appellant refers to a recent holding by the *Second Circuit in Shopmen's Local Union No. 445 (NLRF)* v. *Kevin Steel Products, Inc.,* 519 F.2d 698 relating to the holding that a Bankruptcy Court has the right to approve a Debtor's rejection of an executory labor contract. There is no issue involved with respect to the question of the right of a Debtor to reject an executory labor contract. What the Appellant fails to indicate to this Court is that the labor contract between the Appellant and the Respondent has not been rejected and is in full force and effect at the present time. It is respectfully submitted that an application was made by the Appellant to reject the labor contract between the parties but the application was withdrawn after an answer had been filed by the Respondent on the grounds that the labor contract was not onerous or burdensome to the Appellant. At that time when the application was made by the Appellant, there were approximately five employees covered by the labor contract between the parties and the Respondent was ready to prove that the contract was not onerous and burdensome. Therefore, any reference to the

Shopmen's Local Union No. 445 (NLRF) v. *Kevin Steel Products, Inc.* case and the case at bar is completely ridiculous and inapplicable. It should be pointed out that the thrust of the cases involving the question of the right to reject an executory labor contract involves the question of the right of Congress to enact a Statute to grant to a debtor or trustee the right to reject an executory labor contract and the provisions of the National Labor Relations Act. The thrust of those decisions has been that Congress intended to grant to the Bankruptcy Court under the provisions of Section 313 of the Bankruptcy Act the right to permit a Debtor-In-Possession or a trustee the right to reject this executory labor contract. The substance of the decision in the *Shopmen's Local Union No. 445* case and several other cases of similar nature has been merely to indicate that the Courts should conduct a hearing to determine the equities and that Congress intended to grant to the Bankruptcy Act the right to permit the rejection of an executory labor contract but also stated that the equities of the parties should be considered at a hearing on the issues.

The only case where there would appear to be a conflict is that *Mammouth Mart* case which was published in Corporate Reorganization Reporter Bankruptcy Court on May 29, 1975 at pp. 909-912. However it should be pointed out that this decision was by a Bankruptcy Judge and the Appellant conveniently omits to advise this Court that the decision of Bankruptcy Judge Harold Lavien in the Mammouth Mart case is presently on appeal to the United States District Court of Massachusetts and has not been decided. Therefore, it cannot be asserted that the decision of Bankrupcty Judge Harold Lavien is equivalent to a decision of the Court of Appeals for the Second Circuit. The Court of Appeals for the First Circuit has not as yet made any deci-

sion on this matter and therefore as provided for in Rule 19 of the Rules of this Court, there is no conflict between decisions of Courts of Appeals in two or more Circuits. A reading of the decision of Bankruptcy Judge Harold Lavien clearly indicates that he ignored the main thrust of the decision of the Court of Appeals of the Second Circuit in the *Straus-Du Parquet* case or in the case at bar by reason of the fact that Bankruptcy Judge Harold Lavien clearly ignores the question of when the cause of action arose in favor of the workers. In addition, the reference to the types of administration expense claims by Bankruptcy Judge Harold Lavien is clearly in error when he ignores the fact that causes of action that may have arisen during the pendency of the Chapter XI proceeding for merchandise sold by creditors or work, labor and services performed by creditors would be entitled to be considered as administration expense claims of the Debtor-In-Possession or a Receiver or Trustee appointed by the Court during the pendency of the Chapter XI proceedings. It is respectfully submitted that his decision is completely too narrow to limit administration expense claims to what one might consider the costs of administering a case. The Courts have consistently held that costs and expenses of administration would take into consideration any and all causes of action that arise during the pendency of the Chapter XI proceedings. If one were to give any credence to the decision of Bankruptcy Judge Harold Lavien, it would necessarily follow that a Debtor-In-Possession, a Receiver or Trustee appointed to administer a Chapter XI proceeding could purchase merchandise or employ parties to render services and that the amount due to the person would not be considered as expenses of administration. Certainly, Congress never intended a person to be able to avail themselves of the benefits of Chapter XI of the Bankruptcy Act without being responsible for the payment of those obligations that were incurred during the pendency of the Chapter XI proceeding.

The Court cannot consider the decision of the Mammouth Mart case as a matter that has received a final determination by the Courts of the First Circuit and this would not comply with the provisions of Rule 19 of the Rules of this Court.

The Appellant refers to the matter of *In re Public Ledger,* 161 F.2d 762. It should be pointed out that this case was decided in 1947. It also involved a matter that was not a Chapter XI case. The *Public Ledger* case was a Chapter X proceeding and involved a proceeding where there was not a continuation of the operation of the business but in fact was a case where a Receiver was appointed by the Court and the Receiver proceeded to liquidate the assets of the bankrupt. In addition, the primary concern of the Court related to the question of vacation pay and the question of discharge of employees was simply a collateral issue.

It should be further pointed out that in the *Public Ledger* case which was decided 20 years prior to the decision of the Court of Appeals for the Second Circuit in the *Straus-Du Parquet* case, there were a few employees who were retained by the Receiver simply for the purposes of liquidating the assets of the bankrupt. It should be further pointed out that the provisions of Section 64(a)(1) in its present form were amended in 1967 which was 20 years after the decision of the *Public Ledger* case. That part of Section 64(a)(1) that was amended in 1967 refers to expenses necessarily incurred by a Debtor-In-Possession, Receiver or Trustee and therefore, the Public Ledger case

can certainly not be considered as being in confiict with the case at bar.

The Appellant continues to stress the position that severance pay should be considered as wages incurred prior to the Bankruptcy Act and should be limited to the provisions enacted by Congress in Section 64(a)(2) of the Bankruptcy Act. However, the Appellant takes a hypocritical position. The employees covered by the Union contract with the Respondent are not the only employees of the Appellant. Does the Appellant make any provision for severance pay claims of the other employees? The answer is in the negative. There are over 3,000 additional employees and no provision is made whatsoever for severance pay benefits to these employees although there is such a provision in the various Union contracts including the contract between the Appellant and the Respondent for the employees who are still employed by the Appellant. These employees have no rights whatsoever for severance pay at this time. The result is very simple and clear by reason of the fact that the contracts specifically provide that the right to a cause of action accrues only when the employee is terminated by the act of the employer. None of these employees have been terminated and they are still on the payroll of the Appellant. The question then arises whether the Appellant has listed these employees as being entitled to a priority position to the extent of $600.00 and as an unsecured claim for the balance due them for time that has been earned from the date of their employment to the present time as creditors of the Appellant. Of course, the Appellant takes the position that there is nothing due to these employees by reason of the fact that they are still in the active and gainful employ of the Appellant. Therefore, they are not entitled to any severance pay claim.

The cases referred to by the Appellant with respect to taxes that fall due for pre Chapter XI wages as not being expenses of administration have absolutely no connection or relationship with the case at bar. In those cases, the taxes fell due as stated by the Appellant at the time that the wages were earned. The taxes did not become due and payable during the Chapter XI proceeding but became due and payable at the time that the wages were earned which was prior to the Chapter XI proceeding. Therefore, it is not necessary to even consider the cases referred to by the Appellant in this connection.

The Appellant refers to the case of *In re Ad Service Engraving Company,* 338 F.2d 41 (6th Cir., 1964) as being a case involving severance pay. It should be pointed out that the *Ad Service* case was not a Chapter XI case and did not involve the termination of employees by a Debtor-In-Possession. The *Ad Service* case is a matter involving the filing of an involuntary petition in bankruptcy on February 27, 1961 and the alleged bankrupt was thereafter adjudicated as such on March 8, 1961. Furthermore, the *Ad Service* case was a matter involving vacation pay and Congress has specifically covered vacation pay claims in Section 64(a)(2) as being a wage claim. There is no similarity or connection whatsoever between the *Ad Service Engraving Company* case and the case at bar.

The Appellant refers to the matter of *In re Men's Clothing Code Authority,* 71 F.Supp. 469 (S.D.N.Y.) as being authority for their position. This case not a Chapter XI proceeding. The case refers to a straight bankruptcy case where a claim is made for vacation pay as well as damages sustained prior to the bankruptcy proceeding by reason of the filing of the petition in bankruptcy. There is no claim made in the *Men's Clothing Code Authority* case for sever-

ance pay and it is completely irrelevant and has no connection whatsoever with the case at bar.

The Appellant cites the case of *In re Otto,* 146 F.Supp. 786 (D.C. Cal. 1956) as being authority for their position. This case also has no connection whatsoever with the case at bar. The *Otto* case refers to a claim being made for contributions to a welfare fund. There is no question but that a claim for contribution to a welfare fund is not entitled to priority of any type and that it is simply a general unsecured claim. This matter has been resolved by the Supreme Court of the United States in the case of *United States* v. *Embassy Restaurant, Inc.,* 359 U.S. 29 (1959). Certainly, the *Otto* case has no relationship whatsoever with the facts involved in the case at bar.

The Appellant refers to the case of *McCloskey* v. *Division of Labor Law Enforcement,* 200 F.2d 402 (9th Cir., 1952) as authority for their position. Again, it should be pointed out that the *McCloskey* case was not a Chapter XI case but was a matter where the bankrupt originally made a General Assignment for the Benefit of Creditors and subsequently an involuntary petition in bankruptcy was filed. Thereafter, the bankrupt was adjudicated as such. It is also quite interesting to note that in the *McCloskey* case, Judge Healy wrote

> "The right to the severance wages arose only on the happening of the contingency specified in the contract."

It would therefore appear that Judge Healy would have been in complete agreement with the reasoning of the Court in the *Straus-Du Parquet* case as well as the case at bar because Judge Healy would have decided that the cause of

action arose during the Chapter XI proceeding and it was at that time that the Respondent was entitled to its claim.

At this point, it should be submitted for the edification of this Court that this Appeal is not being prosecuted in good faith. The Appellant has gone to great lengths to try to convince this Court that to grant the Respondent the relief that has been awarded to the employees will prejudice the ability of the Appellant to confirm an arrangement with its creditors. Fortunately, the true intent of the parties has been revealed quite recently. Finally, after several years since the filing of the petition for Arrangement by the Appellant, a Plan of Arrangement has been filed by the Appellant with the Bankruptcy Court. This Plan of Arrangement calls for the payment of the claim of the Respondent in full pursuant to the Stipulation of Settlement between the parties if the Appeal of the Appellant is denied by this Court. In other words, adequate provision has been made for the payment of the claims of the employees covered by this Union contract in the Plan of Arrangement. It should also be stressed that the employees of the Respondent Union have cooperated fully and have granted the Appellant an extension of time to pay their claims in order to assist in the formulation of a Plan of Arrangement. What is most interesting is that if the Appellant were successful in this Court, the Appellant would be unjustly enriched to the extent that it would not be required to pay the claim of the Respondent. There is no provision in the Plan of Arrangement which would indicate that any funds that would be saved by not being required to be paid to the employees would be for the benefit of the other general unsecured creditors. In fact, the Appellant is a creditor in excess of $100,000.00 for health and welfare benefit payments that

were not made by the Appellant and by reason of the decision of this Court in the celebrated *Embassy Restaurant* case, the Respondent is a general unsecured creditor for unpaid health and welfare benefit claims. It is, therefore, most interesting to note that the Appellant and the Creditors Committee have arrived at a proposed Plan of Arrangement which has been approved by the Creditors Committee and which calls for the payment of the Respondent in full in the event that this Appeal were to be decided in favor of the Respondent.

It is respectfully submitted that if any equities of parties should be considered, this Court should consider the claims of employees who have devoted 40 or more years of their lives working for this Appellant and after this length of service are now being terminated and the Appellant is attempting to throw them a bone of allowing them a claim of $600.00 as a priority creditor.

It should be pointed out that the tendency of Congress in recent legislation has been to protect the interest of the workers and in the recent enacted legislation involving pension rights of employees, the provisions of the congressional action has been to vest the benefits for the benefit of the employees so that their interest will be rightfully protected.

It is also further submitted that the reference by the Appellant to provisions with respect to attitude of the report of the Commission on the Bankruptcy Laws of the United States has been misconstrued by the Appellant. A reading of the report of the Commission on Bankruptcy Laws of the United States is quite to the contrary. It is the feeling not only of the Commission on the Bankruptcy Laws of the United States but the feeling of all Bankruptcy Law practitioners, professors, legislators and other persons involved that the present $600.00 wage priority is wholly

inadequate and that it should be increased to $1,200.00 by reason of the increased standard of living and to attempt to grant a priority which would resemble the poverty scale of wages. In fact, the passage of the present proposed Laws before Congress would not change the rationale of the decision of the Court of Appeals of the Second Circuit in the *Straus-Du Parquet* case or the case at bar but would simply increase the priority claims for those employees who are severed prior to the filing of the petition in bankruptcy. At the present time, if an employee were severed prior to the filing of the petition in bankruptcy, his claim for priority is limited to $600.00. The thrust of the proposed new bankruptcy Act would be to increase the claim of the employee as a priority creditor to the sum of $1,200.00.

In addition, it should be pointed out that the sentiment in Congress has been to protect the interest of employees and in addition to protecting employees to have their pension claims vest immediately after payment into the pension fund, there are additional protective measures granted such as the establishment of lien rights to the employees for unpaid contributions to the retirement funds. Therefore, the comments of the Appellant that the trend of Congressional legislation is to limit the rights of the workers is without any basis in fact.

It is respectfully submitted that this case does not involve the question of an interpretation of a Statute enacted by Congress. There is no question betwen the parties with respect to the interpretations of Section 64(a)(1) and Section 64(a)(2) of the Bankruptcy Act. The sole question to be determined is whether an interpretation of the facts of the case indicates which Section of the Bankruptcy Act is applicable to the case at bar. The determination by the Court of Appeals for the Second Circuit in the *Straus-Du*

Parquet case and the case at bar indicates that the interpretation of the facts gives rise to the position that the cause of action accrued at the time that the employer terminated the employment of the claimants. Therefore, the cause of action accrued during the period when the Appellant operated as a Debtor-In-Possession and in view of those circumstances, it is abundantly clear that Section 64(a)(1) would apply to the claim of the Appellant.

It is therefore quite clear that the Appellant has failed to establish that this Court should grant the petition for a Writ of Certiorari as provided for under any of the provisions of Rule 19 of the Rules of this Court.

CONCLUSION

It is respectfully submitted that the petition for Certiorari should be denied.

Respectfully submitted,

SIEGEL, SOMMERS & SCHWARTZ
By: LEONARD SCHWARTZ
Attorneys for Respondent
A member of the Bar of the
United States Supreme Court